

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re)	Case No. 03-00497
)	Chapter 7
JOSEPH CLIFFORD ROSA AND)	
LILLIAN NAOMI ROSA,)	
)	
Debtors.)	
_____)	Adv. Pro. No. 03-90019
)	
Martin Dupont,)	
)	
Plaintiff,)	
)	
vs.)	
)	
Joseph Clifford Rosa III and Lillian)	
Naomi Rosa,)	
)	
Defendants.)	
_____)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING
COMPLAINT TO OBJECT TO DISCHARGE**

On April 28, 2003, Plaintiff Martin Dupont (“Mr. Dupont”), an unsecured creditor, filed a complaint to determine the dischargeability of a debt pursuant to section 523 and to object to discharge pursuant to section 727.¹

Defendants Joseph Clifford Rosa III and Lillian Naomi Rosa (“the Debtors”) filed an answer on May 28, 2003.

¹ Unless otherwise indicated, all section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 et.seq. (West 2002).

A trial was held on October 6 and 8, 2003. Mr. Dupont appeared on his own behalf and Ryther L. Barbin, Esq., appeared on behalf of the Debtors. The following findings of fact are based on the evidence presented.

FINDINGS OF FACT

1. Mr. Rosa is a general contractor holding an ABC license in the State of Hawaii. He is the Responsible Managing Employee (RME) for J.C. Builders, Inc. Mr. Rosa is a shareholder, officer, and director of J.C. Builders, Inc. It is unclear whether Mr. Rosa owns all the stock, whether Mrs. Rosa owns some of it, or whether the couple owns the shares jointly. For purposes of this adversary proceeding, it does not matter.

2. In 1999, Mr. Dupont and American Heritage Homes, Inc. obtained default judgments against Mr. Rosa and Pro Construction Engineering, Inc. for \$5,716 and \$20,175, respectively.

3. Mr. Dupont failed to produce any evidence at trial that (a) the Debtors' debts to Mr. Dupont arose out of a fraud (Count I), (b) Mr. Rosa was a fiduciary of American Heritage Homes, Inc. within the meaning of section 523(a)(4) or that the debts to Mr. Dupont are based on fraud or defalcation (Count II), (c) Mr. Rosa inflicted willful and malicious injury upon Mr. Dupont within the meaning of section 523(a)(6) (Count III), or (d) the Debtors made any fraudulent transfers which Mr. Dupont is entitled to avoid (Count IV).

4. In the Debtors' Statement of Financial Affairs, question number 1, the Debtors listed their income for the year 2001 as \$42,839. The amount listed as income for the year 2001 was the same as the amount reported on line 21, as ordinary income (loss) from a trade or business activities, of the 2001 U. S. Tax Return for an S Corporation filed by J.C. Builders, Inc. This response may not have been accurate. The ordinary income reported by an S corporation on its tax return is not necessarily equal to the total of all income received by its shareholder; further, question number 1 of the Statement of Financial Affairs asks for the debtor's gross income, not taxable income. There is no evidence, however, that this response was a knowing, intentional, or fraudulent misstatement.

5. In the Debtors' Statement of Financial Affairs, question number 1, the Debtors listed their income for the year 2002 as \$46,640. The Debtors understated the amount of income reported for 2002 on their Statement of Financial Affairs. At the time that the Debtors filed their bankruptcy petition, they did not have the benefit of their 2002 tax returns because the tax returns were not yet prepared. For purposes of completing their bankruptcy petition, the Debtors estimated their income for the year 2002. The Debtors' misstatement of their income for the year 2002 was not knowing, intentional, or fraudulent.

6. The Debtors disclosed their stock ownership in J.C. Builders, Inc. on their amended Schedule B, Personal Property, at item number 33. The

Debtors listed the current market value of the stock of J.C. Builders, Inc. as \$100. The Debtors estimate of \$100 was a fair representation of the fair market value of the stock of J.C. Builders, Inc. The book value of J.C. Builders, Inc. was approximately \$11,000, but the book value does not reflect the unknown liabilities of the corporation and is not necessarily equal to the fair market value of the stock.

7. The Debtors' bankruptcy schedules failed to disclose Mr. Rosa's contractor's license. The Debtors should have disclosed the license in response to item number 23 of Schedule B. This omission, however, was not material. A contractor's license has value to the holder of the license because it permits the licensee to work and earn money, but it cannot be sold by a trustee to obtain funds for distribution to creditors.

8. The Debtors did not list a Ford Ranger pick-up truck as an asset on their Schedule B. The Ford Ranger pick-up truck was leased by J.C. Builders, Inc., and, therefore, it is not an asset of the bankruptcy estate. Therefore, the Debtors did not need to list the truck in their schedules.

9. J.C. Builders, Inc. made charitable contributions of \$38,135 during years 2001 and 2002. There is no requirement that the Debtors disclose these contributions in their bankruptcy petition because the contributions were not made by the Debtors.

10. The Debtors failed to list a savings account at American Savings Bank in their original bankruptcy schedules. The Debtors instead listed a second "checking account" at American Savings Bank in their originally filed schedules. This was a typographical error. The Debtors amended Schedule B to correct their error and to reflect the savings account at American Savings Bank. Mr. Dupont failed to present evidence at trial regarding the savings account.

11. The Debtors checked "none" as their answer to question 19(d) of the Statement of Financial Affairs. This answer was incorrect. The Debtors issued a financial statement to A-1 Bonding Company dated May 31, 2001, and to the Department of Commerce and Consumer Affairs. The omission of the financial statements, however, was not knowing, intentional, or fraudulent.

12. The Debtors did not list any withdrawals in their answer to question 23 of the Statement of Financial Affairs. That question only applies to debtors that are partnerships or corporations. The debtors are not a partnership or a corporation and it was not necessary for them to list the withdrawals.

13. The Debtors did not list any suits, administrative proceedings, executions, garnishments or attachments in their answer to question 4 on the Statement of Financial Affairs. Mr. Rosa was involved in a lawsuit with Mr. Dupont and others. The lawsuit against the Debtors was concluded when the default judgments were entered against Mr. Rosa in 1999. The Debtors were not

required to list the lawsuit because the lawsuit was not pending during the year prior to the bankruptcy petition.

CONCLUSIONS OF LAW

1. The complaint to determine the dischargeability of a debt was brought pursuant to section 523 and the complaint to object to discharge was brought pursuant to section 727.

2. Mr. Dupont failed to establish a prima facie case with respect to Count I, Count II, Count III, and Count IV. Therefore, these claims are dismissed.

3. The remaining count in the complaint objects to the Debtors' discharge pursuant to section 727(a)(2). Mr. Dupont must prove that the Debtors transferred, removed, destroyed, mutilated or concealed property with the intent to hinder, delay or defraud a creditor. 11 U.S.C. § 727(a)(2). There is no evidence to support a claim under section 727(a)(2).

4. Mr. Dupont's arguments may be based upon section 727(a)(4), although he does not cite that section. Section 727(a)(4) provides that a debtor may not receive a discharge when the debtor knowingly or fraudulently made a false oath or account in or in connection with the case. There is no evidence to support a claim under section 727(a)(4).

5. The Debtors' misstatements and omissions in the Schedules and Statement of Financial Affairs were not material individually or in the aggregate.

6. The misstatements and omissions were not intentionally, knowingly, or fraudulently made.

7. A separate judgment in favor of the Defendants and against Mr. Dupont will be entered.

DATED: Honolulu, Hawaii, November 12, 2003.



/s/ Robert J. Faris
United States Bankruptcy Judge